

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES H. FISCHER,

Plaintiff,

v.

STEPHEN T. FORREST, Jr., SANDRA F.
FORREST, SHANE R. GEBAUER and
BRUSHY MOUNTAIN BEE FARM, INC.

Defendants.

CIVIL ACTION NO.: 14-CV-1304
14-CV-1307

REPLY IN SUPPORT OF
DEFENDANTS' STEPHEN T.
FORREST, JR., SANDRA F. FORREST,
SHANE R. GEBAUER, AND BRUSHY
MOUNTAIN BEE FARM, INC.'S
MOTION TO STRIKE

This Court granted Defendants motion for summary judgment in its entirety. As such, the case is closed and the evidentiary record is closed. As admitted by Fischer, he filed “a tardy 56.1 statement.” (Fischer Opposition p. 2). Fischer admits he was “unsure how to proceed” and filed his response to Defendants’ 56.1 statement. (Fischer Opposition p. 2).

Fischer’s response to Defendants’ 56.1 statement is not relevant to his 59(e) motion and he has not attempted to explain any relevance. A 59(e) motion is used to allege legal error. *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003). To prevail on a rule 59(e) motion, Fischer must show: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Virgin Atl. Airways, Ltd. v. Nat’l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992). Fischer’s response does not support any of

these elements and it is grossly overdue. Fischer's response is irrelevant and should be stricken because it was not before the Court when Defendants' summary judgment motion was granted.

Even though not relevant, Defendants will address Fischer's allegations concerning their 56.1 statement. Defendants 56.1 statement was properly filed. The Clerk only terminated the Motions and Memorandums in Support for unintentional ECF filing violations. Judge Peck's Order dated April 18, 2017 only directed Defendants to file a single motion and single brief in each case- not to refile their 56.1 statement.

For the foregoing reasons, Defendants respectfully request that the Court grant its motion to strike Fischer's "tardy" response to Defendants' 56.1 statement.

Dated: May 1, 2018

CLEMENTS BERNARD WALKER
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– and –

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Defendant's Reply in Support of Stephen T. Forrest, Jr., Sandra F. Forrest, Shane R. Gebauer, and Brushy Mountain Bee Farm, Inc.'s Motion To Strike** was electronically filed with the Clerk of Court using the ECF system, which will be served by operation of the Court's electronic filing system upon the following *pro se* Plaintiff, who has consented to Electronic Service (Dkt. No. 18) and ECF participants.

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This the 1st day of May 2018

By: /s/ Seth L. Hudson
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